IN THE CONSTITITIONAL COURT OF SOUTH AFRICA

CASE NO.: CCT 114/18

In the matter between:

ROBINHA SARAH NANDUTU	First Applicant
JAMES FERRIOR TOMLINSON	Second Applicant
ILIAS DEMERLIS	Third Applicant
CHRISTAKIS FOKAS TTOFALLI	Fourth Applicant

and

THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Respondent
VFS VISA PROCESSING (SA) (PTY) LTD T/A VFS GLOBAL	Third Respondent

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APPLICANTS' PRACTICE NOTE

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1 APPLICANTS' COUNSEL

1.1 Anton Katz SC, 082 706 1744, antkatz@capebar.co.za

1.2 David Watson, 071 260 2390,

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2 RESPONDENTS' COUNSEL

2.1 Unknown.

3 NATURE OF PROCEEDINGS

3.1 This is an application for leave to appeal the decision of Thulare AJ, in the High Court.

3.2 The matter concerns the constitutional validity of a Regulation 9(9)(a) of the Immigration Regulations 2014, dated 22 May 2014, *Regulation Gazette* 10199 ("Regulation 9(9)").

4 ISSUES FOR DETERMINATION

4.1 The primary issue for determination is whether it is constitutionally permissible to compel foreign spouses and children of South African citizens holding visitor's visas issued under section 11(1) of the Immigration Act 31 of 2002 to leave

the Republic in order to lodge applications to change their visa statuses under the Immigration Act.

4.2 Arising from the primary issue are the following further issues: (1) Whether Regulation 9(9)(a) should be declared unconstitutional and invalid to the extent that it fails to make provision for foreign spouse and children of a South African citizen or permanent resident to make application for a change in status within South Africa; (2) Whether the words "is the spouse or child of a South African citizen or permanent resident" should be read-in as Regulation 9(9)(a)(iii); (3) Whether the Court should review, set aside and substitute the decisions refusing a relative's visa (in respect of the first applicant) and refusing a visitor's visa (in respect of the third applicant).

5 SUMMARY OF THE APPLICANTS' ARGUMENT

5.1 Section 10(6)(b) of the Immigration Act provides that an application for change of status attached to a visitor's or medical treatment visa shall not be made by the visa holder while in South Africa, except in prescribed exceptional circumstances.

5.2 The exceptional circumstances prescribed under Regulation 9(9) are when:

5.2.1 when the applicant is in need of emergency life saving medical treatment for longer than three months; or

5.2.2 when the applicant is an accompanying spouse or child of a holder of the business or work visa, who wishes to apply for a study or work visa.

5.3 The consequence of Regulation 9(9) read with section 10(6) of the Immigration Act is that it does not extend exceptional circumstances to include when the applicant is the spouse or child of a citizen or permanent resident. These applicants must return to their country of origin and remain there (possibly without their family) until they have a new visa.

5.4 These provisions limit the right to dignity and the rights of children under section 28 of the Constitution, and must be held to be unconstitutional to the extent that Regulation 9(9) fails to extend the exceptional circumstances contemplated in section 10(6)(b) of the Immigration Act to the foreign spouse or child of a citizen or permanent resident.

5.5 The just and equitable remedy is to read into Regulation 9(9)(a) as sub-regulation (iii) the words “is the spouse or child of a South African citizen or permanent resident”.

5.6 This is an appropriate instance in which the decisions should not be remitted but this Court should rather substitute the decisions of the respondents with decisions to grant visas to the applicants.

6 EXPECTED DURATION

Full day.

7 WHETHER PAPERS SHOULD BE READ

7.1 The application for leave to appeal (which attaches Acting Judge Thulare's judgment) and answering affidavit should be read;

7.2 The appeal record should be read.

ANTON KATZ SC

DAVID WATSON

LERATO MOLETE

Chambers, Cape Town and Sandton
14 December 2018